July 21, 1932
10c a Copy

Volume 7, Number 11
$1 Per Year

THE LOS ANGELES BAR ASSOCIATION

BULLETIN

Official Publication of the Los Angeles Bar Association, Los Angeles, California

LOS ANGELES BAR ASSOCIATION MEETING

SPEAKING CAMPAIGN BEFORE HIGH SCHOOLS

JUDICIAL OFFICE BECOMING MATTER OF POLITICS

OFFICE OF PUBLIC RECEIVER

LABOR'S USE OF THE INJUNCTION

SELECTION OF SUPERIOR COURT JUDGES

THE BAR PRIMARY

JUNE AND JULY SPEAKING ENGAGEMENTS

Printed by PARKER, STONE & BAIRD COMPANY
Law Printers and Engravers
241 East Fourth Street Los Angeles, California

Dinner Meeting
Los Angeles Bar Association

ALEXANDRIA HOTEL

THURSDAY, JULY 21ST, 1932

THE SELECTION OF JUDGES

Open Forum

Members of the Association present at the June meeting voted to hold an open forum meeting in July, in order that methods of selection of judges be made a special order of business, thus providing ample time in which to discuss the subject.

Some time ago a special committee was appointed to consider methods of selecting judges for Los Angeles County. The Committee, through its Chairman, Hon. John Perry Wood, presented its plan at the June 23rd meeting. In addition to the Committee's plan, several other plans have been published recently by members of the Los Angeles Bar, several of which have appeared in the Los Angeles Bar Association Bulletins of May, June and July, and in the Los Angeles legal papers.

The Committee's plan appears in the July issue of the Bulletin. It is requested that members give careful consideration to this plan and that criticisms and suggestions in regard thereto be given in writing to the Committee, as well as from the floor at the forum meeting.

It is anticipated that all plans proposed will be given consideration at this meeting and no other business will be considered, thus giving the entire time of the meeting to the special order of business.

The problem to be discussed is of vital public interest, and it is hoped that there will be a large attendance.

Program Committee.

PLEASE MAIL YOUR RESERVATION CARD PROMPTLY

Dinner, $1.25 **Informal** **6:00 P.M.**

Guests, particularly the ladies, are always welcome

Los Angeles Bar Association Bulletin

VOL. 7 JULY 21, 1932 No. 11

Official Publication of the Los Angeles Bar Association. Published the third Thursday of each month. Entered as second class matter August 8, 1930, at the Postoffice at Los Angeles, Calif., under the Act of March 3, 1879.

BUSINESS OFFICE
241 EAST FOURTH STREET
TRinity 5206

Editorial Office
511 Citizens National Bank Bldg.
TRinity 0274

Speaking Campaign Before High Schools

BY JUNIOR BAR MEMBERS

A five weeks speaking campaign by members of the Junior Bar Committee before the students of the High Schools and Junior High Schools, has just been finished. The subjects discussed were the opportunities in the law and educational qualifications required of those seeking to enter the profession.

Phil Davis, Chairman
Robert Wanenmaker
Jack Welsh
Elizabeth Davis
Maynard Toll
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Herbert F. Sturdy

Judicial Office and Its Administration Becoming Matters of Politics

DECLARES COMMITTEE ON JUDICIAL SELECTION. BENCH HAS RETROGRADED UNDER PRESENT SYSTEM. RECOMMENDS WOOD PLAN WITH MODIFICATIONS

To the President and Board of Trustees of the Los Angeles Bar Association:
Gentlemen:

Your Committee on Judicial Selection begs to report as follows, having in mind that the report will be the basis of discussion at the June meeting of the Association and that out of that discussion may come suggestions for later consideration by the Committee:

Your Committee has made such examination as time would permit into the methods of judicial selection used in the other states, by the United States, in Europe and in the British commonwealths. It has examined various plans set forth in available publications and has had the advantage of suggestions made by members of the Los Angeles Bar. It has reached the conclusion that the plan set forth in the May issue of the Los Angeles Bar Association Bulletin at pages 259 to 265 with certain modifications should be recommended as presenting a method of judicial selection designed to take the judicial office out of politics, give assurance of capable judges, and yet retain in the people proper control of the judicial branch of government.

It must be obvious to all that everywhere in the densely populated communities of the United States where systems of direct selection of judges obtain, the bench has steadily retrograded. Incumbency of judicial office and its administration are becoming more and more matters of politics. The office is becoming less and less attractive to the best qualified lawyers. It is believed that the people now realize this and know that it is practically impossible for them under present conditions to exercise a proper choice from among the great number of judicial candidates ordinarily presented to them. One hundred five candidates have presented themselves for the next election for judges of the Superior Court. Confusion, dissatisfaction and positive danger to the administration of justice increases with each election. The public is looking to the bar to suggest a remedy.

Constitutional Amendment Required

To effect any change in the present method of judicial selection, a constitutional amendment will, of course, be required. The necessity for change of method is not pressing in the less populated counties where the bench and bar are known to the people sufficiently to enable intelligent popular choice. The amendment could be made applicable to Los Angeles County alone. This seems desirable in view of the manifest public demand in this county for a change and the lack of adequate information as to the state of public mind in the other populous communities. It would seem that the rest of the state would be willing to allow this county to establish its own method of judicial selection applicable to its particular needs.

No attempt has been made to present an amendment to carry out the suggested plan. The fundamentals and the details of the plan should first be thoroughly worked over in the light of criticism and enlightening discussion.

The Proposed Plan

1. A Judicial Selection Board of five consisting of the Chief Justice of the State, the Presiding Justice of Division 1 of the District Court of Appeal for this Appellate District, and three laymen elected by the people. At the first election one should be elected for two years, one for four years and one for six years. Thereafter, one should be elected biennially.

2. The members should serve without pay, but the Board should have a research director upon salary paid by the county, in amount sufficient to enable the employment of a thoroughly competent man. The work of such a director would be greatly facilitated by the use of machinery already set up by the Judicial Council.

The Board should be charged with the duty of keeping a running survey of the work of the courts, setting up statistical information designed to show the number of cases tried, the number of reversals, the

capacity, diligence and devotion to duty of each judge.

3. At a time not more than sixty days nor less than thirty days before the expiration of the judicial term the Board should determine what judges it shall recommend to be retained. These the governor would be required to reappoint.

If the Board fail, prior to the 30th day before the expiration of the judicial term, to recommend any judge for reappointment, the office of that judge should become vacant upon the expiration of that judge's term of office, and the Board should certify to the governor not less than thirty days before the expiration of the term a list of eligible lawyers, double the number of those to be appointed, together with a full statement of the qualifications and experience of each lawyer so certified. From this list the governor should make appointment to fill the vacancies.

Provision should be made that a judge removed from office by the Commission to which reference is hereafter made, may not again be placed upon the eligible list.

4. The present term of six years should be retained. (The committee considered appointment during good behavior with power of removal by the Board at any time with the consent of the governor. The six year term, however, seems preferable. The poor judges could be dropped more easily; good judges would be almost certain of retention.)

5. By the same constitutional amendment the Supreme Court should be invested with power at any time to appoint a commission of three to investigate the conduct and qualifications of any judge or judges. This commission should serve without pay but provision should be made for the payment of the expense of its investigation by the county on demand filed by the commission with the Board of Supervisors. The commission should have power to issue subpoenas, administer oaths and take testimony. It should have power in the event of the refusal of any witness to answer questions, to certify the questions which the witness refuses to answer, with the fact of his refusal, and a statement of the issues sufficient to show the relevancy of the questions, to a judge of the Superior Court designated by the committee. That judge should be under duty to require answer to all relevant questions and upon failure to answer to punish as for contempt.

The commission, after its investigation, should make findings and recommendations either for or against the continuance in office of any judge investigated. If the recommendation be against continuance, the commission should file with the Secretary of State its findings and recommendations and a declaration that the office is vacant. Thereupon, the office should become vacant and be filled by appointment by the Governor from an eligible list supplied by the Board as above provided.

6. By the same constitutional amendment, provision should be made for appointment by the Chief Justice of one of the Judges of the Superior Court as its presiding judge, to hold office at the discretion of the Chief Justice.

7. By the same constitutional amendment, provision should be made that no judge of said Superior Court shall be a candidate during the term for which he is selected for any office other than a judicial office.

Advantages of the Plan

1. The necessity for the people to elect a large number of judges each two years, from among those who may present themselves, will be avoided. With the present number of candidates, it is not possible for the people truly to determine the character and capacity of the candidates. It is believed the people now recognize this and will look with favor upon a more efficient method. Obviously it will be much easier for the people each two years to elect one member of their selecting board than to elect directly many judges. The position will be so important that to it the public and the bar will give serious attention. With only one to be elected, it ought to be possible for the public to impress into service, and elect a thoroughly capable layman. The Chief Justice and the Presiding Justice of Division 1 of the District Court of Appeal for this District, being elected by the people of the state at large and by the people of this appellate district respectively, will be able to act disinterestedly and with impartiality.

2. The people will still keep control of the courts, but through the representative principle. They elect the Governor. They elect the Chief Justice of the Supreme Court and the Presiding Justice of the District Court of Appeals, who will constitute two of the Board. The remaining three members, laymen, they will likewise elect. The Board determines which of the encumbent judges should be retained and which ones should be replaced. It will determine upon an eligible list, upon the basis of character and

efficiency, from which the Governor will make appointment to fill the vacancies. A more apt use of the representative principle to remedy impossible conditions scarcely could be suggested. This principle is applied today in the making of laws and in the appointment by the national executive and by state executives of heads of departments, who in turn appoint the men under them. It applies also to the Federal Judiciary. The plan here contemplated, moreover, answers the objections made in some quarters to the method obtaining in respect of appointment of the Federal Judiciary.

Everywhere, except in the United States and in the cantons of Switzerland, judges are appointed and not elected. Even in California, approximately half of all of our judges took office first by appointment by the governor. Judges so appointed are among our strongest judges. Of the eleven states in which judges are *not* selected by popular election, all except two, Maine and Mississippi, belong to the original thirteen colonies. Lawyers almost universally recognize the fact that these old commonwealths, which have clung to the supposedly less democratic methods of choosing judicial officers, usually have the strongest courts.

3. The Board in determining what judges should be retained and in preparing its selected list, will be able to apply business principles and to use all available methods of inquiry to determine the qualifications of those whom it has before it for recommendation, including bar plebiscites if desired by the Board. Three of the members will be laymen, the other two will be judges and not lawyers who appear before the Superior Court. Objection to placing lawyers upon the Board, based upon the view that they would occupy a position of undue influence in the Superior Court will be obviated.

4. The prime advantages of the Civil Service plan will be applied to the selection of our judiciary. Judges can be efficiently selected, upon the basis of their ability truly to serve and will be relieved of office when incapacity for such service appears.

5. The Board being without pay, temptation to seek membership upon it by self seeking persons will be minimized.

6. A check upon arbitrary or political action by the Board and by the Governor will be supplied by the two factors:

(a) The appointment ultimately will be made by the governor. He, however, must appoint from the selected list.

(b) If poor appointments be made or judges deteriorate in efficiency, or other reason for removal appear, the Supreme Court has power to appoint a commission to examine into the question and determine whether the continuance of a judge in office is compatible with the public service. The commission will have power to declare the office vacant. Appointment to fill such vacancy will be made by the governor from the selected list. At present judges can be removed only by the legislature or by recall and no machinery for investigation exists.

7. Election expense to the people will be greatly reduced.

8. The poor judges can be eliminated within six years.

9. The Board, having means and time at its disposal to carefully examine into the qualification of candidates, the selection of a really poor judge would be extremely improbable. The great responsibility placed upon the Board would undoubtedly result in a high degree of care in selection.

10. If men can be appointed to the bench whose ability and capacity for work is equal to that of the best of the present judges, the number of judges necessary to keep the calendars up to date would be materially reduced, with great saving of cost to the taxpayer.

11. With all the trial courts filled by thoroughly capable persons, the time and cost of trial to litigants would be greatly reduced and the work of the courts of appeal would likewise be greatly reduced.

12. Under this plan the present temptation, indeed the practical necessity, on the part of the judges to engage in politics and in activities designed to keep their names before the people would be removed. They could devote their entire time and effort to their judicial work. They would be independent of everything except the obligation and necessity to do their work properly.

13. Salaries have been placed at a figure which will enable men of the right type to accept the office with a view to making the judicial work their life career, provided they are not subjected to the distress and hazard of election each six years. Under a plan in line with that presented men would aspire to the office who, under elective method would not even accept appointment by the governor, knowing an election must be faced within two years, much less become candidates for election in the first instance.

14. Unless some such plan is adopted, the people and the Bar can look forward only to more and more men of incapacity obtain-

ing judicial office. That judge will be able to retain his office who has the best flare for publicity and for making acquaintances, and who knows how to, and is willing to, modify his judicial conduct with a view to the next election.

15. The presentation at the present time of a plan in line with the foregoing will not jeopardize the use of the present plebiscite method. On the contrary, the presentation by the Bar of a more thorough going plan will have the effect of letting the public understand that the Bar is looking only to the ultimate public good, that it has no particular predilection to itself make the choice of judges, but that it presents the plebiscite plan to meet the acute situation and to fill the gap until a more thorough going remedy may be applied.

Respectfully submitted,

JOHN PERRY WOOD, *Chairman.*
WM. H. ANDERSON
FRANK JAMES
J. KARL LOBDELL
OSCAR LAWLER

JUNIOR BAR STAG AFFAIR

Bel-Air Country Club was the scene of the program of the Junior Committee's annual stag party on June 24th. Golf and tennis tournaments were held in the afternoon. The winners of the golf tournament were Louis W. Andrews, Jr., Steve Grogan, and De Forrest Home. The handsome prizes awarded were the gifts of Irving W. Walker, Guy Richards Crump, and Joe Crider, Jr. The Daily Journal donated the prizes in the tennis tournament, which were won by Barclay Leeds, and Gus Mack after a hot contest.

In the evening a banquet was served the members and guests, among the latter being Earle Daniels, Stephen Underwood, Lawrence L. Larrabee, Hubert T. Morrow, Charles Baird and Bertin A. Weyl.

The young attorneys were addressed briefly by Hubert T. Morrow, who originally suggested the idea of the Junior Committee six years ago, and who is one of its present advisers, along with Judge B. Rey Schauer and Joe Crider, Jr. A snappy program of entertainment was presented by Boyce and Owens, RKO dancing star, "Bus" Berkeley and his troupe, and Glenn Edmunds and his Collegiate Band. The one hundred and twenty members present at the banquet voted the affair a real success, and chairman Lowell Matthay expressed the appreciation of the Junior Bar to Jack Hardy and his committee for the enjoyable "stag."

JUNIOR BAR RECALL PETITION COMMITTEE

A committee of seventeen members of the Junior Committee of the Los Angeles Bar Association has been appointed by Chairman Lowell Matthay of the Junior Committee and is cooperating with the Recall of Judges Committee of the association.

This committee is headed by Jerold E. Weil who is assisted by four sub-chairmen, Charles E. Beardsley, Gerald F. Bridges, John S. Chapman, and Augustus F. Mack. Each of the members of the committee is signing up at least five other members of the junior bar to help in the work, so that the active working force will be about one hundred.

The purpose of the committee is to place recall petitions where they will be circulated by volunteer circulators. The committee started out by undertaking to place petitions in all law offices in about fifty downtown office buildings. All other buildings will likewise be covered. Widespread cooperation has been given in this work and a large number of signatures are expected to result from this source.

The sub-committees are also placing petitions for circulation among employees and others connected with business firms and corporations, contacting clubs and service organizations, and securing volunteer circulation of petitions in office buildings and neighborhoods.

The committee expects to secure a substantial part of the signatures required and to reduce to a considerable extent the necessity of employing paid circulators. Contacts so far made indicate a generally spontaneous approval and endorsement of the recall.

All members of the Junior Committee who desire to aid in this work are requested to get in touch with Jerold E. Weil, 1036 Security Building, MIchigan 8694.

Office of Public Receiver

COUNTY COUNSEL SUBMITS TO THE BOARD OF SUPERVISORS PROPOSED BILL TO CREATE COUNTY OFFICE AS ADJUNCT OF SUPERIOR COURT

In March the Board of Supervisors passed a resolution instructing County Counsel Mattoon to prepare a bill to be introduced in the legislature creating the office of Public Receiver. In response thereto the County Counsel has prepared a bill confining the operation of such an office to Los Angeles County. In view of the wide local interest in the subject THE BULLETIN presents the statement to the Supervisors and the form of the proposed legislation.

June 6, 1932

Honorable Board of Supervisors,
County of Los Angeles,
Hall of Records.
Gentlemen:

In accordance with your resolution of March 21st, we have prepared a bill creating the office of public receiver.

Such an office would appear to be unnecessary in the smaller counties and there has been no agitation in the other populous counties of the state indicating the need of the office there. We have, accordingly, prepared the bill in such a form as to confine its operation to this county. In order that this may validly be done, the office is made an adjunct of the superior court, which it would in fact be in any event. As creating an officer of the court, such legislation may be limited to counties of a designated population.

Martin v. Superior Court, 194 Cal. 93;
Noel v. Lewis, 35 Cal. App. 658.

The creation of a county office in the technical sense would be invalid unless applicable to all the counties in the state.

Coulter v. Poole, 187 Cal. 181.

Although the office is thus connected with the superior court, the personnel will be subject to the same control as county officers and the public receiver appointed by your Honorable Body under civil service. This appears to be valid as other officers closely connected with the court, such as the county clerk and probation officer have the same status.

While your resolution provides for a schedule of fees it does not appear possible to definitely fix the fees for the public receiver. Receiver's fees are fixed by the courts and it is doubtful whether a set schedule in one county would be valid. The only way a schedule could be computed would be in relation to the value of the property involved in a case, which would necessitate an appraisal in every instance. This would be a very expensive process otherwise wholly unnecessary in many cases and tending to increase the cost of receivership proceedings. It is provided that the fees of the public receiver shall be not less than those of the public administrator where the administrator's fee can be computed without a special appraisal. We think that in practice this will meet the thought in your resolution and provide at least a sufficient revenue to make the office self-sustaining.

Respectfully yours,
EVERETT W. MATTOON,
County Counsel,
By R. C. MCALLASTER,
Deputy County Counsel.

An Act to add sections numbered 570.1 to 570.6, both inclusive, to the Code of Civil Procedure of California to provide for an officer of the Superior Court in counties having a population of nine hundred thousand and over, to be known as Public Receiver, and prescribing his powers and duties and the powers and duties of the Superior Court and of certain public officers in relation to the Public Receiver.

The People of the State of California do enact as follows:

Section 1. New sections are hereby added to the Code of Civil Procedure of California to be numbered respectively 570.1 to 570.6, both inclusive, and to read as follows:

570.1. In every county in this state having a population of nine hundred thousand and over there shall be an officer of the Superior Court in and for such county who shall be known as Public Receiver.

Provisions in a freeholders' charter governing any such county and ordinances or regulations authorized by such charter re-

lating to the qualifications, appointment, tenure, removal and/or compensation of county officers, their assistants and deputies and employees in county offices and to the number of such assistants, deputies and employees, shall apply to the public receiver, his assistants and deputies and to employees in his office.

Where there is no freeholders' charter the public receiver shall be appointed and may be removed by the Board of Supervisors, and his assistants and deputies and employees in his office shall be appointed and may be removed by the public receiver. The tenure of the public receiver, his assistants and deputies and of employees in his office shall not be terminated by change in the personnel of the appointing power, and they shall not be removed for political or religious reasons.

In all matters not within the provisions of any such charter or ordinance or regulation authorized thereby, the public receiver, his assistants and deputies and employees in his office shall be subject to the general laws relating to county officers, their assistants and deputies, and to employees in county offices, except as otherwise specifically provided.

570.2. The provisions of law applicable to oaths of office and official bonds of receivers and of county officers, their assistants and deputies and of county employees shall apply to public receivers, their assistants and deputies and employees in their offices, except that the amount of the bond of the public receiver shall be one hundred thousand dollars. Section 567 of this Code shall not apply to public receivers, but the court or judge may require the public receiver to post an additional bond in any particular case and applicable only to such case in such amount as the court or judge may order; any premium paid for such additional bond to be a charge against the assets in the hands of the receiver and not against the county. If there shall be a change in the incumbency of the office of public receiver, the person becoming public receiver shall, without further order of the court, post additional bonds in the same amounts as those of his predecessor in office in all cases in which such additional bonds shall have been ordered.

570.3. Except as otherwise specifically provided, the public receiver shall have the same powers and duties as other receivers. The provisions of section 570.1 of this Code shall not apply to persons employed by the receiver in particular cases in connection with a single case, but only to regular members of the public receiver's staff. The public receiver shall have the same power as other receivers to employ persons required for the proper administration of any case in which he is appointed, and persons so employed shall not be considered as public officers or employees but shall be deemed in the private service of the business in the course of which they are employed to the same extent as in cases where private receivers are appointed. This section shall not authorize employment by the public receiver of the same person in successive and unrelated receiverships for the purpose of evading civil service regulations, and any such employment shall be invalid.

570.4 The public receiver shall be entitled to the advice and services of the legal officer of the county whose duty it is to advise and represent the county and county officers in civil cases to the same extent as officers of the county. Such county law officer shall be paid reasonable fees, to be fixed by the court, for legal work for the public receiver in any case on the same basis as an attorney employed by receivers other than the public receiver, and all such fees shall be paid into the county treasury by such law officer. With the approval of the court the public receiver may employ attorneys other than the civil law officer of the county in particular cases to act in conjunction with or in the place and stead of such county law officer as the court may order.

570.5. In any county where there is a public receiver such public receiver shall be appointed by the court as receiver in all cases wherein a receiver is appointed. Appointments of the public receiver shall be of that officer in his official capacity and not as an individual. If the person holding the office of public receiver shall for any reason cease to hold such office, all papers, money and property in his possession as public receiver shall remain in the office of the public receiver and any person becoming public receiver shall succeed to all the powers and duties of the public receiver in all pending cases in which the public receiver has been appointed, and no new appointment by the court shall be required. In any case where it appears that the interests of the parties require the appointment of a receiver other than the public receiver because of the magnitude of the case or the necessity of special skill or knowledge on the part of the receiver, the court may appoint a co-receiver

or co-receivers to act jointly with the public receiver.

No co-receiver shall be appointed under this section except upon the approval of three judges if there be three or more judges of the superior court in the county, or of all the judges of the court if there be less than three. In any county wherein there shall be a public receiver where there are more than three judges of the superior court, a committee of three judges shall be elected annually by a majority of all the judges of the court to serve during the succeeding calendar year to pass upon appointments of co-receivers under this section and the concurrence of two members of such committee other than the judge before whom the case may be pending shall be necessary in any order appointing a co-receiver hereunder. Vacancies in any such committee shall be filled by election in the same manner for the unexpired term. During the first calendar year hereunder, a committee shall be elected to begin serving immediately upon election and to serve for the remainder of such year. All members of the committee shall serve until the election of their successors.

570.6. The public receiver shall be allowed reasonable fees for his services in every case in which he is appointed, to be fixed by the court. The costs of the receivership shall be collected by him from the funds or property in his hands. If such funds or property be insufficient to pay such costs or if the property coming into the possession and control of the public receiver be of such character that the money cannot be obtained therefrom for the payment of such costs, having due regard to the interests of all parties concerned, the court may order any party before it in the case to pay such costs or part thereof. Before appointing a receiver in any case where a public receiver is required to be appointed or at any time during the progress of the case the court may order any party applying for the appointment of a receiver to deposit in court an amount sufficient to pay the probable costs of the receivership or such part thereof as such party may be required to pay. The payment of the costs in any case shall be provided for by the court before the public receiver may be required to turn over the property in his possession in such case. At the time of making a judgment or decree finally disposing of any case in which the public receiver has been appointed, judgment shall be entered for any unpaid costs of the receivership against any party liable therefor, which shall be enforceable in the same manner as other civil judgments.

The term "costs" as used in this section shall include the fees of the public receiver and of any county law officer or other attorney employed by the public receiver pursuant to section 570.4 of this Code.

The fees of the public receiver shall be not less than would be allowed the administrator of an estate in probate where the amount of such administrator's fee can be reasonably determined, but it shall not be necessary to appraise the assets in any case solely for the purpose of determining such fee. All fees paid to the public receiver shall be paid by him into the county treasury in the same manner as the fees of county officers.

NEW MEMBERS

S. Y. Allen
LeRoy Anderson
Roscoe C. Andrews
Stanley M. Arndt
J. R. Atwill, Jr.
Max Bamberger
Irl D. Brett
Albert W. Cartlidge
Adele O. Carver
Joseph S. Dubin
Henry Duque
J. Gilbert Fall
Eugene P. Fay
C. Arden Gingery
Arthur J. Hair
Walter S. Home
Philip D. Johnson
C. F. Jorz
Geo. A. La Liberty
Edward D. Landels
John Ruskin Lane
George R. Larwill
LeRoy B. Lorenz
Stanley M. Love
David Lyons
Geo. W. Manierre
Harold W. Mattingly
John E. McCall
Harold L. McClanahan
Robert McWilliams
Gilbert E. Moody
Joseph M. Nealon
Alfred S. Northrup
Edward C. Olson
Emond W. Pottle, Jr.
George C. Pratt
Joseph Raycraft
John Stewart Ross
Elizabeth Silton
Archie A. Smith
Myron E. Smith
James M. Stevens
Arthur L. Syvertson
John W. Topham
Henry R. Thomas

DECEASED MEMBERS

Virgil H. Lockwood	May 2, 1932
Hon. F. M. Angelotti	May 24, 1932
Martin L. Haines	June 29, 1932

Labor's Use of The Injunction

Leon R. Yankwich, J.D., LL.D., Judge of the Superior Court, Los Angeles County

NOTE: Use of the injunction in labor disputes has been a subject of great controversy. Recently, Congress passed and the President approved the Norris-La Guardia bill, which limits the uses of injunctions in labor disputes arising in federal courts. One of the phases of the controversy which has not received much attention is the fact that in recent years labor has been using this weapon. The question is open in California. At the winter conference of the Pacific Southwest Academy, which is a division of the American Academy of Political and Social Science, held at the University of California at Los Angeles, in February, 1932, the subject of the conference was "Problems of Labor in the Pacific Southwest." By invitation, Superior Judge Leon R. Yankwich participated in the conference and delivered an address on "Labor's Use of the Injunction." The address, not having heretofore been published, Judge Yankwich has consented to its publication in The Bulletin, in view of the timeliness of the subject and of the fact that the courts whose decisions Judge Yankwich analyzes and approves, present a new point of view, which is not definitely settled in California and may be subject of much controversy in the future.

"Le droit ne domine pas la societe, il l'exprime."

In these words, does a French legal student (*Jean Cruet*: La Vie du Droit) sum up the moderon sociological approach to law. Many of the failures of our conceptural jurisprudence are due to the failure of courts to see social realities. Instead, they endeavor to apply outmoded concepts to modern conditions. In no field has the result been so disastrous to social peace as in the application by courts of the common law doctrine of "conspiracy" to industrial disputes. It has resulted in many of the abuses of which labor has justly complained.

That brilliant student of the modern state, *R. M. MacIver* has written (*MacIver*: *The Modern State*, page 270):

> "The trouble about eternal principles is that, like dogmatic religions, they become antiquated and obstructive. The law faced with new situations, applies ancient formulas. The history of the dealings of the courts with industrial labor is full of illustrations of the inadequacy of 'eternal principles'. . . It has taken rubrics belonging to an old order, such as that of 'conspiracy' and applied them to situations to which they were wholly inappropriate. Above all, it has emphasized the static relation between persons and property to the neglect of the dynamic relation between persons and function. The law has been at home in dealing with the rights of property, but it has been far less successful in dealing with the less material aspects of conduct and service, where rights must be attached, not to a substantial thing but to functions which men fulfill in the life of the community." (See, *Clarence E. Bennett*: The Origin of the Labor Injunction, 5 Southern California Law Review, p. 105)

The complaint has been greatest against the use of injunctive process by employers. A vast literature has grown up on the subject. (See, *Frankfurter* and *Greene*: The Labor Injunction.) It need not detain us here. That the problem is not one fostered merely by the extremists in the ranks of labor is evidenced by the following statement by Professor *Francis Bowes Sayre*, a very judicious student of the problem,—in a popular magazine (The Forum, January, 1931):

> "Thus the problem of the injunction is not only a legal problem. It is a profoundly important social problem as well. Its present excessive use is not only ineffective for the purpose of preventing or reducing industrial conflict; it is tending to provoke a sense of unfair treatment at the hands of the courts on the part of substantial producing groups in the community, and thus to undermine their faith in law and their respect for the courts. Such a situation calls for constructive effort to meet the growing danger, not only by Labor leaders, but by all who believe in American law and American traditions."

Elsewhere, *Sayre* has written:

> "To secure social peace is one of the primary objects of law. There can be no enduring social peace without a generally prevailing belief that all alike may obtain the same measure of justice in the courts. Whether justified or not, a su-

stained sense of unfair treatment by the courts on the part of any vital producing group in the community is a danger of first magnitude." (*Sayre: Labor and The Courts,* 39 Yale Law Journal, 682, 683.)

As the basis for the feeling of "unfair treatment" on the part of labor, of which *Sayre* speaks, is its conviction that neither labor nor the right to do business is, or should be, considered property. Secretary *Frank Morrison,* of the American Federation of Labor, in an address delivered at Los Angeles, on Labor Day in 1927, expressed the thought in this language:

"The labor injunction is based on the theory that the right to labor is property and the right to do business is a property right. If that is true, the labor injunction is correct, for the purpose of the injunction is to protect property where the plaintiff has no other remedy at law. Trade unionists, however, deny that the right to labor and the right to do business is a property right. We insist that these are personal rights. If that is true, the labor injunction cannot be used, for this process is supposed to be never used in personal relations." (*Southern California Labor Press,* Vol. IV, No. 36, September 9, 1927.)

"By judicial fiction," said *Mathew Woll,* before the National Civic Federation, "assumption, interpretation and presumption, practically every relationship and activity is charged with an element of property or property right sufficient to warrant interference by the equity process." (*Southern California Labor Press,* Vol. IV, No. 51, December 23, 1927.)

But we are not concerned here with the measures which labor has advocated in order to curtail the abuses of which it complains. What I wish to call attention to is a phenomenon of comparatively recent origin, namely, the use of injunctive relief by labor itself. We find sporadic uses of injunctions by labor dating back to 1892. The case to which several writers on the subject have referred is one in which an injunction was asked (and denied) to prevent blacklisting. (*Worthington v. Waring,* 157 Mass. 421 (1892).) Several other instances exist of applications for injunctive relief against the boycott of employers.

But the first succcessful attempt by labor to use the injunctive process to prevent breaches of collective bargaining contracts by employers occurred in 1922, when the courts of New York decided the case of *Schlesinger vs. Quinto,* 194 N.Y.Supp. 401. For a better understanding of the basis upon which the courts have granted relief in such cases, a brief statement of the legal background of the problem (with special reference to California) should be given.

It was not until the early 19th Century that the organization of labor for the purpose of increasing wages or reducing hours was declared, by courts, to be lawful, and not a conspiracy under the Common Law. And we realize more and more that in the industrial field it is not the individual employer who faces the individual employee, but the group of employers who face a group of employees. Even in cases when an employer deals with an individual employee —the employer is (more or less) representative of all employers in the same field. It is apparent that in the realm of labor we are changing from the status of contract between individuals to a status of contract between groups. For this reason, the courts of California have recognized not only the right of employees to organize, but also their right, as a group, to appeal to outsiders for sympathy and aid of their cause, *through the use of social pressure: Pierce v. Stablemen's Union,* 156 Cal. 70; *People v. Armentrout,* 1 Cal. App. 170.

In *Exchange Baker & Restaurant, Incorporated, vs. Riskin,* 245 N Y. 260, a decision of the Court of Appeal of New York, which has been the subject of much comment, the right of the employer is stated as follows:

"The latter (employer) may hire and discharge men when and where he chooses and for any reason. But again any combination must be for lawful ends secured by lawful means. If believed to be to their interest employers may agree to employ non-union men only. By proper persuasion they may induce union men to resign from their unions. . . . The means adopted must be lawful. No violence or intimidation, no threats, no trespass, no harmful false statement, no means that would be improper."

California courts have declared the rights of the employee in similar language. In *Southern California Company vs. Amalgamated Association,* 185 Cal. 602, the court said:

"*In the absence of contract,* the right of a workman to quit his employment is as absolute as the right of a fellow employee to remain in the employment, or of another workman to take the place vacated by the one who has quit, or the right of the employer to dispense with an employee's services. Furthermore, it is

lawful for the employee who has quit peaceably to persuade a fellow employee to leave his position. Moreover, if there are a number of employees who have left a common employer, they are within their legal rights if and when they attempt, as a group, to persuade other employees, who continue to work, to quit, provided there be no force, violence or intimidation, physical or moral, used; that is, the mere fact of numbers does not necessarily make such persuasion illegal, but where violence, threats, or intimidation are used in an effort to induce another to quit his employment, then the acts of an individual or a number of individuals are unlawful and may be enjoined."

In the exercise of these rights, courts will give no consideration to the question of motive. This principle has been reasserted repeatedly since the decision in *Parkinson Company vs. Building Trades Council,* 154 Cal. 581, in 1908. That case, in turn, merely reaffirmed and applied the conclusion reached in an earlier case — *Boyson vs. Thorne,* 98 Cal. 578, decided in 1892, and from which the court quoted the following:

"An act lawful in itself is not converted by a malicious, bad motive into an unlawful act so as to make the doer of the act liable to a civil action."

We do not recognize conspiracy as the basis of a civil action, and the secondary boycott is legal with us.

Recognition having thus been given by our courts to the social realities which call for combination of employees, I feel that we should go a step further and, following the New York cases, recognize the fact of collective bargaining and lend our aid, through the use of the injunctive process, in preventing breaches of contracts by employers. Some of the older cases, which denied relief, were based upon the assumption that injunctive relief could not be granted to the employer against the union for breach of agreement. They therefore denied it to the union. But, in later years, the courts have recognized fully the right of the employer to an injunction in such cases, in order to prevent the breach of a contract of employment.

Again, as one writer has stated, "since the practical effect of the injunctions so widely used by employers to combat strikes is to force a return to work, the doctrine of mutuality of remedy seems rather to support than to "oppose the workers' plea for injunctive relief." (43 *Harvard Law Review,* 1159.)

By extending the right to the unions, these courts, in effect, say, "We are merely making this extraordinary process of injunction a two-sided instrument." Nor is the objection available that, in effect, courts are enforcing contracts for personal services. The decree *does not* run to the individual employee, but to the parties to the contract. The unions, through their control of the membership, can comply with the decree. So can the employer or group of employers through the control of the power to hire and fire. I can see no stronger objection to such a decree than to a decree directed against a person, like an employment agent, who having agreed to furnish labor to an employer at a definite time, should, because damages would not be an adequate remedy, be ordered to supply the labor. In such a case, it could not be contended that the court was directing its decree against labor and was forcing practical servitude upon persons who might be under agreement with the agent to accept employment found by him. The means which the union, or the agent may have to use in order to comply with an agreement which it or he has made to furnish and supply labor to another would not enter into the court's consideration. So considered, the agreement becomes enforceable against the union as well as against the employer, and the objection upon the ground of lack of mutuality fails. This is the view of the New York cases, and other cases which have followed them: *Schlesinger vs. Quinto,* 194 N.Y.S. 401; *Goldman vs. Cohen,* 227 N.Y.S. 311; *Ribner vs. Rasco Butter & Egg Co.,* 238 N.Y.S. 132; *Gregg vs. Starks,* 188 Ky. 834; *Hollingsworth vs. Texas Hay Assn.,* 246 S.W. 1068; *Barnes vs. Berry,* 156 Fed. 72.

The cases have been the subject of extended comment. The following may be referred to: *Alpheus T. Mason*: Organized labor as party plaintiff, 30 Columbia Law Review 466; *Frankfurter* and *Greene*: Injunction in American Labor disputes, 45 Law Quarterly Review 41; *Edwin E. Witte*: Labor's Resort to Injunction, 39 Yale Law Journal 374. *Witte,* in the addendum to his article lists a group of cases preceding the *Schlesinger* case where resort had been had to injunction, and cases which have arisen since, to the time of the publication of the article in January, 1930. On the whole, he lists 73 instances in which injunctive relief has been sought by labor unions to prevent the doing of certain acts or threatened acts by employers.

In the *Schlesinger* case, (1922), the New

York Cloakmakers Union obtained a restraining order to prevent the Cloak and Suit Manufacturers Association from breaching its contract with it providing for employment of its members upon a week-work basis instead of the piece system. This system the employers had voted to abandon. In upholding the trial court, the Appellate Division said:

"The cases thus far decided have been at the suit of the employer against combinations of labor, for the simple reason that this is the first time that labor has appealed to the courts. The principles of law on which they were decided are applicable to a combination of employers who by coercive measures seek to break contracts between employer and employee. The remedies are mutual; the law does not have one rule for the employer and another for the employee. In a court of justice they stand on an exact equality, each case to be decided upon the same principles of law, impartially applied to the facts of the case, irrespective of the personality of the litigants. . . . Experience has shown that such industrial struggles lead to lockouts, strikes, and acts of violence. In the end, one side or the other is compelled to yield through financial exhaustion. Both sides have lost. If the employer is successful, the men return to work embittered. If the employees win, they have inflicted incalculable loss on the employer, and the advantage gained does not effect the loss of wages during the period of the strike. But, above all, the employer and the employee, instead of cooperating to promote the success of the industry, become permanently divided into hostile groups, each resentful and suspicious of the other. Therefore, when the employee, instead of resorting to force to secure his rights, an archaic method abandoned by civilized men, seeks redress in the tribunal constituted by the government to protect its citizens in their rights and redress their wrongs, it is the duty of the court to stop all individual attempts to take the law into their own hands, and compel both parties to await an orderly judicial determination of the controversy."

In the *Goldman* case (1928), a restraining order was issued to restrain an employer from violating an agreement with the International Pocketbook Workers Union not to employ any but union men, by threatening to conduct a non-union shop.

Sustaining the order, the court said:

"The making of the contract being conceded, and upon this record the same subsisting in full force and effect, the plaintiffs are entitled, pending the trial of the action, to injunctive relief for the protection of such of their rights as are threatened and the violation of which will produce irreparable damage. Usually in the past it has been the employer who has sought the help of the courts for the protection of his rights, but obviously the same principles of law apply equally to both employer and labor union."

In the *Ribner* case, (1929) the object of the injunction was to enforce an agreement which called for the discharge of any employee who had ceased to be a member of the union. Sustaining the order, the court stressed (as did the court in the Schlesinger case) the worthiness of the object of such agreements to achieve peace in the industrial arena, saying:

"Legislatures and courts recognize the right of labor unions to enter into lawful contracts on behalf of their members with the employer for the purpose of promoting the welfare of their members, and in furtherance thereof such agreements should be clothed with legal sanction and afforded the mutual protection of the law. It is in the interest of good government that labor unions and employers should be afforded this reciprocal protection in their lawful contractural undertakings. It is proper and praiseworthy that a union, as in the instant case, having entered into a contract with the employer and feeling aggrieved because of an alleged breach thereof by the employer, should come into a court of equity and there seek the protection of its rights rather than to resort to picketing and strikes to redress its wrongs, with the resultant effect upon the orderly conduct of business and inconvenience to the public. Under the terms of the contract here presented there is mutuality of obligation. There should be mutuality of remedy. The contract is valid. The power of a court of equity to issue an injunction to prevent such alleged violation is well established."

In California, we had a precedent, which, unfortunately, was lost by the fact that when the case reached the Supreme Court, the contract had expired and the court declared the question moot. The case was *Weber v. Nasser*, 61 Cal. App. Dec. 125, decided April 10, 1930. In that case, the Superior Court of San Francisco had

sustained a demurrer to, and dismissed, the complaint of members of the San Francisco Musicians' Union, against certain theatre owners, with whom the unions had collective bargaining contracts, to enjoin them from discharging their orchestras following the installation of talking picture apparatus. On appeal, the judgment was reversed, the District Court of Appeal giving recognition to the principles just discussed. The conclusion of the opinion, which was written by Mr. Presiding Justice *John F. Tyler,* of the First Appellate District, Division One, is worth quoting:

> "Counsel for respondent have expressed the opinion that the later cases are based upon expediency rather than reason. We do not think so. Courts should, in the interest of public welfare, give recognition to the laudable effort of groups to improve industrial conditions and prevent waste and violence, and where the parties have contracted with that end in view, their contracts should be enforced in a manner to give them effect if possible. In their enforcement the remedies should be, and they are, mutual. The law does not have one rule for the employer and one for the employee. In a court of justice they stand on an equal footing."

The Supreme Court granted a hearing of the cause. But, by the time the case came up for argument, the contract, the breach of which the unions sought to enjoin, had expired. So the court declared the issue moot and refused to either approve or disapprove the ruling. (80 Cal. Dec. 507). The granting of the hearing sets aside the opinion of the Court of Appeal. It thus loses its standing as a precedent which trial courts must follow and (as the Supreme Court said):

> "The matter stands as though *no* decision of any kind has been rendered therein by any reviewing court."

Of course we may, if we choose, follow it. I did so, in a recent case, wherein, while denying an injunction to the projectionists' union because the theatre company had disposed of the theatres at which it had agreed to employ union labor only, I gave full recognition to the doctrine declared in this and in the New York cases. (*Harden v. Fox West Coast Theatres,* L.A. No. 319, 606) But, of course, a trial judge's opinion is no precedent except for himself and for those who might choose to follow his reasoning. Otherwise, it is merely his prognostication of what the higher courts may or may not hold some day, when the question reaches them again. And predictability is not a certain guide.

Upon the question of policy, students are not agreed. It is recorded, as a fact, that the injunction in the *Schlesinger* case resulted almost immediately in a labor victory, the employers abandoning the attempt to go back to piece-work, in violation of their agreement with the union. Yet many labor leaders have discounted the effectiveness of the injunction and have advised against its use upon the ground that it would impair labor's fight against the admitted abuses of the injunctive process in labor disputes. The conclusion reached by *Witte* commands approval. He writes: (39 *Yale Law Journal,* pp. 379-380)

> "To date, resort to injunctions by labor has been exceptional. The most frequent use of this weapon has been made by 'radical' unions, not affiliated with the American Federation of Labor. The Federation has steadfastly discouraged attempts to secure injunctions on behalf of labor. Doubtless, this is due to the fact that it would appear inconsistent to apply for injunctions, while condemning them on principle. Doubtless also, the attitude which Law and Labor has been taking toward injunctions has been influenced by the controversy over employers' injunctions.
>
> "The fallacy of this argument seems to me to be quite clear. Labor can consistently argue that resort to injunctions by employers is unfair and unwarranted, and yet make use of the same weapon when occasion presents itself. This is not an endorsement of the principle of injunctions, but merely a counter-offensive —an administration to employers of a dose of their own medicine.
>
> "It is probable that in the future, labor will apply to the courts for injunctions much more frequently than it has in the past. Union officials and attorneys who have steadfastly counseled against the use of injunctions by labor are quite free to admit that there are situations in which such injunctions can be used very effectively. For the present, however, there is little likelihood that they will become as numerous as injunctions by employers, nor that they will play anywhere near so large a role in labor controversies."

Selection of Superior Court Judges for Los Angeles County

Frank James, of the Los Angeles Bar

There is, speaking generally, unanimity among members of the bench and of the bar that the present system of selecting judges for the superior court of Los Angeles county is not suited to the conditions of that county.

This situation is not peculiar to the county of Los Angeles, for it is the judgment of well informed laymen and lawyers that the popular election of judges for counties of large populations with corresponding large electorates, is a failure.

There is, therefore, a widespread movement on foot here and elsewhere to find and substitute some other and better method.

In keeping with the policy of the Los Angeles Bar Association which, for some time, has been doing research work on the subject, a committee of the bar, under the chairmanship of Judge John Perry Wood, was appointed to draft and present a plan for the selection of superior court judges for Los Angeles county that would, it was hoped, remove some of the evils attending the operation of the present elective plan.

At the June meeting of the Bar Association the committee reported, with some modifications, the plan outlined by Judge Wood in the May number of the Bar Bulletin. Several other plans had been discussed by the committee. The one presented at the June meeting is a composite of the somewhat divergent views of members of the committee. Personally, I prefer to have lay members of the recommending board appointed by the ex-officio judge-members of the board rather than that they should be selected by the electorate at large at a general election, since, it seems to me, the vices complained of arise out of the elective system and that, therefore, the proposed plan would continue rather than entirely remove them. The two essential differences between my plan and the Wood plan are in the number of judges and lay members on the recommending board, and in the method of selecting lay members. However, I have no fixed and unalterable notions on these matters. Any appointive plan is better than the present elective system. The subject is one of supreme importance and I feel it should be approached by members of the Bar with open minds.

The chief objection to the present elective system is that it is obnoxious to members of the bar best fitted for judgeships, with the result that they will not accept candidacy much less seek office, thereby opening the door to those who have the "pull" and succeed thereby quite irrespective, in many cases, of qualifications esteemed so essential anl desirable for members of the bench.

Necessarily, the test for judicial office is "fitness," that is, learning in the law, experience at the bar or on the bench and proper background — cultural and legal — a background that brings dignity to the office — a man whose outstanding virtues command and receive the respect of his fellowmen. This is the ideal judge and any system that is not planned to attract this type of person to the bench is a tragic failure.

It is not meant that recognized leaders of the bar are necessarily the fittest for the bench. Experience has taught us otherwise. The qualifications that make up leaders of the bar on the one hand and the ideal judge on the other are ofttimes quite the opposite. They should have, in common, learning in the law, but the aggressiveness and the temperament that go with advocacy and mark leadership are frequently disqualifying rather than qualifying attributes. The problem of selection is one of individuals, and its solution must be found by placing the power of final selection with those best qualified to make the choice.

The problem is to furnish a plan that will enable some properly constituted, well informed and capable authority to weed out the unfit by selecting from the bar and retaining on the bench those best fitted for judgeships and then keep them there during good behavior.

The research work already done discloses that, as a rule, better judges are secured under the appointive than under the elective system. Democratic notions concerning the elective franchise as a cure-all are still in vogue in some places, but the majority of persons studying this subject are agreed that it has given the courts both indigestion and congestion, and has led some of the judges into unbecoming practices.

We must, therefore, turn hopefully to the appointive system as a convalescing potion,

if not a complete cure. It is agreed that our hope for improvement lies in the substitution of some other than the existing elective system for the selection of judges.

And this brings up the interesting questions. APPOINTED BY WHOM? APPOINTED FOR WHAT LENGTH OF TIME? HOW SHALL MEMBERS OF THE APPOINTING BOARD BE SELECTED?

APPOINTED BY WHOM? Selections for the bench must be made from members of the bar and from the bench. The present law so provides and no sound reason has been advanced for changing this law.

There are close to 3,000 practicing lawyers at the bar of Los Angeles county. In this great county there are over 1,000,000 registrations out of a population of about 2,300,000.

Lawyers as a class and many of the judges are known to a very limited number of lay voters. Voters, therefore, as a rule have no first hand information concerning lawyers best qualified for judicial positions, and are compelled to rely, under the present elective system, on recommendations of individuals, or upon the result of the local bar plebiscite, neither of which is entirely satisfactory. The recommendations of the former are seldom based on careful and impartial investigations, and the weakness of the plebiscite is that its field for selection is perforce limited to self-nominated candidates; that is to say, the plebiscite has no part in the selection of nominees for judicial positions.

Next to lawyers and incumbents on the superior court bench, what persons are best qualified to pass on the fitness of prospective appointees for the bench? Admittedly members of the supreme and of the appellate benches. Lawyers and incumbent superior court judges are excluded, the latter because of their standing candidacies for reappointment, the former in order to eliminate all pretense of domination of the personnel of the superior court.

While fitness is the test for election of judges, a matter within the knowledge or grasp of lawyers and judges on the bench, administration of the office is quite another matter and an important one, too, embracing, as it does, the number of judges on the bench at the same time, their salaries, the expense and outlay for the court, the dispatch of court work, and other administrative details. In these administrative details, the tax payers of the county are vitally concerned and should, therefore, have representations on the appointing or recommending board. Besides, lay members will give a helpful balance to the deliberations of the whole board.

The present method of filling vacancies in superior court judgeships is by appointment made by the governor. There is a strong feeling that this precedent should be incorporated in the proposed appointive plan but limiting appointments to a list of eligibles furnished the governor by a board of recommendation, composed of representatives of the supreme and the district appellate courts and an equal or predominating number of laymen.

APPOINTED FOR WHAT LENGTH OF TIME? It stands to reason that the ideal judge should be kept on the bench during the useful period of his life and that his term should not be abridged except for misbehavior.

In many states the term of office is limited to seventy years. There are some drawbacks to life tenure. Under our constitutional set-up the court is an institution separate and apart; it is one of the coordinate departments of the state government—the judicial as distinguished from the legislative and the executive.

Extraordinary powers are vested in the court. Its proceedings and judgments deal with the lives and the property of the individual. There is a check by appeal when the judge oversteps the law of the land, but there is no check, under the present law, for misconduct justifying removal save by impeachment by the legislature or removal by joint resolution of the same body, or by recall at the instance of the whole body of electors of the county.

These proceedings are very cumbersome, expensive and extremely uncertain of result, even in meritorious cases, circumstances which, some think, ofttimes shield, if they do not encourage a course of unbecoming conduct.

The complaint against the present system centers on recurrent elections at short intervals. A short judicial tenure has its virtues and also its faults. Its sole virtue is that it affords the electorate an opportunity to retire an undesirable incumbent. But to be effective, where the electorate is numerous, the franchise must be used intelligently and this can be done only if well informed, which as we have seen, is not probable.

The faults of the short term are many but its chief fault, expressed in the language of the "hi-powered" salesmanship of the day, is that the worthy and unworthy in-

cumbent alike, to get his name before the electorate has, during his term of office, to "sell" himself to the voting public or fail to be reelected and this, of which there is much evidence, cannot be done without belittling himself and casting the dignity of the court to the wind.

Under the appointive plan the short fixed term should be adopted, but only as a means to retain the deserving on the bench and as affording an easy exit for the misplaced incumbent.

Relieved, as he he will be, under the appointive system, from the politics and publicity that go with reelections, the deserving incumbent will be assured of a life tenure.

SELECTION OF SUCCESSORS TO MEMBERS OF RECOMMENDING BOARD. The chief justice of the supreme court and the two presiding judges of the second district court of appeal, should be ex-officio members of the recommending board. Successors to these persons should take office by virtue of their official positions. These three judges should appoint four laymen for short terms.

The laymen of the first board should be named in the proposed legislation. They should serve by lot for two and four years respectively. The full term should be four years.

How are their successors to be selected? By the Governor? By appointment of the ex-officio members of the board? By the judicial council? By the board of supervisors? By the state or the local bar association? Or by electors at a general election? My thought was, and it still rules, that successors to the laymen should be appointed by the ex-officio members (judges) of the board. This plan will undoubtedly retain on the board its experienced members on the one hand or result, on the other in drafting capable laymen to take their places.

The first objection to the plan is that it may be looked upon, by the lay public, as a scheme for perpetuation in office; that is to say, might become, after a while, an instrumentality of very great political power over the judiciary, and great power unless ultimately under the control of the electorate, by some quick and effective means, is dangerous and, therefore, is to be avoided. A free and untrammelled judiciary always has been and still is every man's best heritage. The answer is that under the plan proposed the electorate would have predominating representation on the board.

The second objection is that the voting public are not willing to give up entirely their present elective right to select judges. The objection, it seems to me, is political rather than logical; but it is worthy of serious consideration since before any appointive plan may be substituted for the present elective system, the constitution must be amended and to do so the approval of the electorate must be secured. The natural tendency on the part of the electorate is to retain their present franchise privileges, and legislation that abridges these privileges must have real merit and be intrinsically sound in order to secure their approval.

The trouble with the matter in hand is that any method of selection for public office is unavoidably mixed with some degree of politics. It is our business to minimize the political aspects to the lowest point possible. This can be accomplished, it is believed, by providing for the selection of judges by appointment made by the governor from a list of eligibles furnished by the proposed board of appellate judges and laymen.

This plan will dispense with the necessity for the kind of political activity indulged in by incumbents and aspirants under the present elective system and, in my opinion, come nearer eliminating all politics than any other.

THE CROWDED BAR

"The National Conference of Bar Examiners have estimated that in 1930 there were at least 160,000 lawyers in the United States as compared with 122,000 in 1920 and 114,000 in 1910, making an increase since 1910 of over 40%. You will observe that of the total increase of 46,000 lawyers since 1910, 38,000 or 82% has occurred since 1920. In 1930 about 20,000 applicants were examined, of which number about 10,000 were admitted. In 1931 there were 2,865 applicants admitted to the bar in the State of New York alone, of which number 2,540 were admitted in the First and Second Judicial Departments. Such evidence as is available indicates that there are about twice as many new lawyers admitted annually as are needed."

(From "Law Schools and Lawyers," by Young B. Smith, Dean of the Law School of Columbia University, in the American Bar Association Journal for July.)

The Bar Primary

HARVARD PROFESSOR DISCUSSES THE CLEVELAND AND CHICAGO PLANS

By Professor J. M. Landis, Law School of Harvard University

This memorandum concerns itself with attempts during recent years by the bars of metropolitan areas to improve the selection of their judges. Only cities where the principle of judicial election by popular vote prevails have been considered. Furthermore only cities of significant proportions have been noted. These attempts center about an institution that I have designated as the bar primary. That institution broadly covers a bar poll upon candidates, the formation of a bar slate, and active campaigning by the bar for its ticket. Data on the cities examined—Chicago, Cleveland, Denver, Detroit, Los Angeles, St. Louis and San Francisco—have varied so much in completeness and quality, that my concern has been chiefly with the first two cities. It is believed that their experience furnishes data for some deductions. Furthermore, this memorandum has been written with the New York situation in the background, and consequently it emphasizes considerations peculiar to this situation. The author wishes to acknowledge his indebtedness to Mr. Grenville Clark of the New York bar whose public-spirited desire for knowledge based upon surer foundations than loose generalizations was responsible for this inquiry.

"The Bar Primary is only an effort to make the best of a bad situation."

Introductory

The bar primary has been employed by numerous bar associations during recent years in an effort to improve the selection of judicial personnel. An estimate of the possibilities of this device cannot be made without regard to the situations in which it has been employed. Its success or failure to aid in the selection of judges from a metropolitan area bears little or no relation to its possibilities when used by a state-wide bar as an aid in the selection of judges from the state at large. The device, however, is primarily a metropolitan device, used by the bar in an effort to guide a metropolitan electorate in the election of judges to serve that area. This aspect of the bar primary is our concern. Metropolitan areas, however, present different problems in the selection of their judicial personnel. These variants must be borne in mind when their experiences with the bar primary are examined. No estimate of the value of the bar primary as a whole can thus be made. Instead the bar primary must be weighed in the light of its efficacy to meet particular problems.

For these reasons it becomes necessary to project the work of any particular bar association upon the political and social background of the metropolitan area with which it is concerned. Within the compass of this report, it is obviously impossible to do this with many cities. Instead of attempting to do so, and thereby tend to make deductions from inadequate data, the method chosen is that of concentrating upon the experience of two cities, Cleveland and Chicago. They happen to present contrasts and likenesses that, it is believed, will enable one to determine with more accuracy the possibilities and limitations inherent in such an institution as the bar primary.

The reasons for choosing Cleveland and Chicago from the six or seven large cities where the bar primary has been employed were several. The bar associations of the two cities are both comparatively large and active. They both resorted to the use of the bar primary about a decade ago as the result of outstanding defects in the judicial personnel. Both have had an experience of ten years with the device. But the more important reasons underlying this choice are the differences which the two cities present. The causes making for incapable judges were different. The political problems against which the two bar associations pitted themselves were different. And their achievements present a striking contrast.

Background of Judicial Selection in the Two Cities

The City of Cleveland dominates Cuyahoga County as Chicago dominates Cook County. Both cities possess a municipal court, whose jurisdiction is confined to the territorial limits of the city as well as to certain classes of litigation. Both counties possess county courts with jurisdiction throughout the county, and having *nisi prius* jurisdiction generally in all civil and crim-

inal cases. Important *nisi prius* litigation is generally conducted in the county courts as distinguished from the municipal court, though in Chicago the municipal court is entrusted with a broader class of litigation than in Cleveland. The city lawyers and the city bar associations are thus concerned with the character of the judicial personnel in both sets of courts and have sought to exert their influence in the selection of both types of judges. The bar associations of both cities embrace the majority of practising lawyers within the city and its outlying suburban area. In both cities, the influence of subsidiary bar associations within the county has until recently been negligible.

In Cleveland since 1911 the city and county judges have been elected on a non-partisan ballot. Nomination of candidates is made by petition in the cases of judges of the Municipal Court. Judges of the Court of Common Pleas are nominated by primaries and by petition. Cleveland possesses a strongly organized Republican party but is withal remarkably independently politically minded. Though party politics plays a not wholly inconsiderable part in the primaries, the use of the non-partisan ballot has admittedly succeeded in largely eliminating the force of organized politics in the selection of judges. Neither of the major political parties conducts active campaigns for the election of judicial candidates. Political endorsements have not been lacking, nor the opportunity for candidates to address avowedly partisan meetings, but the party as an organized force with a definite slate of judicial candidates is missing.

The non-partisan ballot, however, did not solve the situation in Cleveland. In the opinion of many observers it aggravated it. Whereas hitherto parties had nominated judicial candidates and were in some measure held responsible for the quality of the candidates they sponsored, the non-partisan ballot introduced new and undesirable elements. The field became open to every aspirant who conceived himself capable of organizing electoral support. Strength achieved through mere publicity, not to say, notoriety, the ability to make an appeal though organizing racial, religious or economic feeling, these factors became of large significance. The problem that faced the Bar Association was thus not one of combating the organized strength of one or more parties, but of combating the strength of individual candidates and the tendency of the method to eliminate worthy candidates and to make judicial election dependent upon factors that had little relevance to the quality of the candidate.

Chicago presents a strong contrast. County judges are there nominated by party conventions; municipal judges by party primaries. The final election is also purely partisan. The city for the major portion of this century has been controlled by the Republican party, which has consistently sought to elect its candidates to the bench. The Republican organization is strong, and has employed the power of patronage to build and maintain itself. The Republican organization has, however, within the past decade been severely shaken by internal dissensions. Indeed, it is a combination of "machines," and the opposition of these machines to each other, aligning themselves *ad hoc* with the Democratic party has been a severer threat to continued Republican domination than the single opposition of the Democratic party. The Chicago Bar Association has thus been pitted against different forces than the Cleveland Bar Association. At times it has essayed the task of combating one portion of the Republican party, with the aid of an opposition Republican group, aligned now and then with the Democratic party. At other times, it has sought to sponsor its own slate, consisting of candidates from the slates of two or more parties. But throughout its contests, unlike those in Cleveland, have been with organized party control and in the face of slates of candidates sponsored by organized political groups.

The Bar Primary in Cleveland

In 1921 circumstances compelled the Cleveland Bar Association to participate actively in judicial elections. Prior thereto it had been customary for the Association to take a straw vote on judicial candidates and announce this result to the public. No effort was made to do more than announce the results of this primary. By election time the vote had been forgotten by the press and the public, with the consequence that it had practically no effect.

The 1922 campaign is illustrative of several similar campaigns where the effectiveness of the bar primary followed by a bar campaign cannot be estimated. The endorsed candidates were sitting judges, who by that fact held a notable advantage over other competitors. None of the candidates seems to have antagonized any significant group in the community. Other powerful agencies sprang to the support of the endorsed can-

didates. In this and other instances the bar's candidates also had the endorsement of the executive committees of the Republican and Democratic parties. Several of these agencies, such as the Civic League and some of the press, were, however, presumably led to support the bar's candidates because of the fact that they had the bar's endorsement.

By 1926 the device of the bar primary was brought before the Association for reconsideration. Dissatisfaction had been voiced against it. It had not succeeded in its original hopes of relieving judicial candidates "from the necessity of carrying on personal campaigns and engaging in public controversies, and in their campaign speeches impliedly obligating themselves to various interests for support." The volume of campaign expenditures by the individual candidates had continued to assume undesirable proportions, and much concern was felt over the policy of candidates soliciting campaign subscriptions from members of the bar and court appointees. Defeats of endorsed candidates had led to a questioning of the value of the bar's activities as compared with other competing factors. A committee was appointed to consider the entire scheme. Its report, however, was in favor of continuing the bar primary and bar campaign with important changes. It advocated carrying on "a more extensive campaign and over a longer period," raising a larger fund to support the campaign, and insisting that candidates to be eligible for the bar's endorsement must pledge themselves not to solicit campaign contributions from members of the bar, court appointees, or financial institutions with legal departments.

The Association accepted the recommendations of its committee, and carried on the 1927, 1928 and 1929 campaigns under these conditions. In 1927 all five candidates endorsed by the bar were elected. These five candidates were also sitting judges. In 1928 three candidates were endorsed for Judges of the Court of Common Pleas and all three were elected. Each year has seen a substantial increase in the sum spent by the Association in conducting its campaigns. The individual expenditures of the judicial candidates remained, however, a matter of concern. Additional difficulties have been created by the formation of the Cuyahoga County Bar Association which also conducts a bar primary and which has on occasion endorsed other candidates than those sponsored by the Cleveland Bar Association.

In 1930 the Cleveland Bar Association again overhauled its machinery dealing with judicial candidates. It felt that its endorsement and its campaign could be made of such significance that it could relieve candidates for the bench of a large share of the burden of campaigning. It determined to increase its committee on candidates to thirty members and to impose upon them the additional duties of inducing qualified lawyers to run, of keeping informed upon prospective candidates, and of recommending a picked number of candidates to the bar for endorsement. More important, however, is the inauguration of a new policy which prohibits all solicitation of campaign contributions by endorsed candidates, and imposes upon the Association the duty of securing an adequate campaign fund for the support of its candidates.

Estimate of the Cleveland Experience

These ten years of activity by the Cleveland Bar Association enable one to reach certain generalizations upon the effectiveness of the device as there employed. The measure of its success cannot be determined by the simple device of comparing the number of endorsed candidates elected with the number of endorsed candidates defeated. Nothing is a more illusory means of measurement than this. The readiness of the public to accept the bar's endorsements cannot be gauged merely by the votes cast for its endorsees when other important factors contribute to that result. What is significant is the ready acceptance of the bar's endorsements by other civic associations, the value which the candidates themselves attach to this endorsement, and the support by the press of the bar's nominees.

That the work of the Cleveland Bar Association has been in part, successful is attested by several factors. Civic associations have been quite ready to accept the bar's endorsements. The press, with reservations, has followed in its wake. Some observers feel that, in the absence of extraordinary circumstances, endorsement by the bar is essential to secure election to the bench. Very significant in this respect is the bar's recent action taking upon itself practically the whole burden of conducting judicial campaigns and limiting the activity of judicial candidates to such as it deems becoming of aspirants for judicial office.

The bar primary in Cleveland has failed, however, in one significant respect. Though admittedly it may have succeeded in electing

the best qualified of a number of candidates, it has done little thus far to bring to the bench judges with higher qualifications. The need for individual campaigning—too often distasteful to the type of man that should be elevated to judicial office—still remains. Because of this leaders of the bar association have sought to make structural alterations in the methods of selecting judges, recognizing that the bar primary is only a means for alleviating what had been proved to be an intolerable situation. The recent attempt made by the association to alter the character of the judicial campaign may induce better qualified persons to seek office, but it is too early yet to determine whether much can be achieved in this line.

One other factor deserves mention. The bar primary and the bar campaign are a heavy burden for the bar association to assume. The expenditures each year are mounting. More time and more effort are continually being consumed. This burden the bar association assumed in the interest of a principle already recognized as basic to good government, that of a qualified and capable judiciary.

The Bar Primary in Chicago

The use of the bar primary by the Chicago Bar Association can be dated back to 1906, the date of the establishment of the Municipal Court system. Activity by the bar until 1921 rarely went beyond the poll and the announcement of the result.

Two distinct types of judicial campaigns are illustrated during the last ten years in Chicago. The first, as illustrated by 1921, is a contest between rival political organizations of approximately equal strength. In such a situation the organized activity of the Bar Association becomes significant. The second is a contest one-sided in character because of the coalition of factions into one political group of decided strength. Here the Bar Association's activities have failed to make much appreciable difference in the result. Whether the judicial election is an independent election or whether it is part of the general election makes little difference. In Chicago the party leaders are definitely concerned with judicial offices and thus far the control of party over judicial elections has only been threatened by disaffection in the party and not by the Bar Association.

Some other factors developed by the Chicago experiment are noteworthy. With about four thousand members in the Association, the result of the plebiscite as an informal opinion upon the qualifications of candidates has been seriously doubted. The Committee on Candidates seeks to aid the members' judgment by rating the candidates with such terms as "well qualified," "unqualified," and "qualified." Its recommendations in this respect are not always followed, the primary in 1927, for example, resulting in the rejection of one candidate who was a member of the Board of Managers and the endorsement of one candidate who in the opinion of the Committee in 1923 had "by reason of his unjudicial and unethical conduct most seriously impaired his usefulness as a judge." Indeed, the Committee on Candidates has expressed itself as believing that mere position on the ballot is a significant factor in the bar polls. Endorsements by the bar primary also represent often only a minority of the Association, though a fair proportion of the ballots are cast. The Association also has had difficulty with the campaigning that attends its own primary.

Observers are frankly doubtful over the effectiveness of the bar primary in Chicago. The press is not willing to accept its results unreservedly. That it has some educational value must, of course, be admitted. But the problem of educating such an extensive electorate to the selection of some eighty-six judges every six years, in the face of determined political ambitions to make judicial office a party question, is too great to be met by the bar primary.

Evaluation of the Bar Primary

The Cleveland and Chicago experiments reveal the bar primary operating in strongly contrasting situations. In the former city election to the bench, due to the non-partisan ballot and the temper of the city, is not primarily a political and partisan issue. Judicial office has ceased to be regarded as an appendage of party, and the electorate has largely been thrown upon its own resources in selecting judges. Advice as to the merits of individual candidates who seek judicial office when disinterested, capable and sincere, thus assumes a significance and may well play a dominant role. It is this advice which the mechanism of the bar primary and the bar campaign seeks to give. In Chicago a situation is presented where the election of candidates to judicial office is but one concern of party organizations. Ideally the vote for judicial candidates may be supposed to be a test of their qualifica-

tions. The difficulty, of course, remains that the electorate may be intrinsically unable to judge of qualifications. But in such a situation as is presented by Chicago, the electorate is not often presented with the simple issue of choosing candidates upon the basis of their qualifications for the office; there is the added and dominating factor of party. Where the issue is primarily party, disinterested and capable of advice upon such a fine question as the qualifications of an individual for judicial office tends naturally to have less effect.

The value of judgments reached upon the basis of the bar plebiscite is open to serious question. Obviously the only means by which any large electorate can intelligently reach a conclusion as to the fitness of candidates for office is by having the qualities of these candidates brought home to them. The usual method for doing so is the act of campaigning. Whether advisedly or not, this method is excluded by the bar primary. It substitutes, at most, a printed biographical circular sometimes accompanied by recommendation from an inner group. Upon these facts those who are uninformed, and there are many in a group comprising from two thousand to four thousand members, express their judgments. Naturally such a judgment, which becomes controlling, is open to serious question.

The bar primary again produces often accidental judgments. The fact of endorsement or non-endorsement may rest upon the lack of one hundred or so voters out of several thousand. The absence of these votes may often be due to lack of information rather than to the fact of lack of qualifications by the candidate or the presence of better qualifications by another candidate.

The bar primary presents its results to the public in the form of a seemingly united endorsement by the bar. The actual votes of the various candidates in the bar primary have no lasting significance. What remains is the fact of endorsement or non-endorsement. Though the opinion of the bar may be appreciably divided, in outward form it is otherwise, and unity of action and the suppression of divided opinion becomes a necessity for the effectiveness of organized bar campaigning.

Experience seems to have demonstrated that the bar primary must be limited to the membership of a particular organization and subsidiary organizations. The consequence is that the bar primary itself may not bespeak the voice of the bar but only of a portion of the bar, perhaps numerically in the minority. The vote thus presents itself as an effort by the association to arrogate the unknown voice of the bar and to dictate not only to the public but also to the bar. When the metropolitan area possesses more than one strong bar association, the possibilities of a divergent opinion within the bar attain proportions that diminish the effectiveness of the entire device.

Extremely important is the fact that the bar primary has not succeeded in bringing forward as candidates for the bench material of much different calibre than was theretofore seeking judicial office. It can only succeed in doing so by altering the whole character of elections to judicial office. Despite endorsement by the bar, the contest for judicial office remains, and the fact of contest for popular election and all that this implies is the outstanding reason for many qualified candidates refraining from seeking judicial office. Such a contest has been readily eliminated where political organizations have concurred in supporting particular judicial candidates, but bar endorsements and bar campaigns have yet to prove the possibilities of achieving a change in these conditions.

Such advantages as are to be derived from the bar primary are attributable to the opportunity it affords the bar to assume a guiding role in judicial selection. Presumably the bar is more adequately equipped to determine the qualifications of candidates for judicial office than the lay electorate. A judgment by the bar thus has significance which, in the absence of countervailing considerations, may well be controlling. Leadership in the selection of material for judicial office must come from some source. Such leadership may come from party where partisan politics are enabled to govern the selection of the judiciary. But where such a mechanism as the non-partisan ballot destroys party leadership, the result is usually chaos.

When the appeal of expertness that the bar can make has to combat stronger appeals than those dependent upon individual popularity, the inability of the bar primary to achieve results becomes evident. In the face of determined political opposition by organized political parties, the bar seems impotent. Only when there is rivalry between opposing political factions, which indeed, may be stimulated by the bar, does the bar primary on occasion prove the deciding factor. The political appeal has broad aspects to it which

the bar cannot under present conditions hope to meet. Against such appeals of patronage, of a coordinated policy, of a system of rewards, of loyalty, the single appeal of expertness is too unavailing. And it must be remembered that if considerations other than mere expertness and integrity properly dominate the selection of judges, the duty for the weighing of such consideration lies upon the electorate and not alone upon the bar.

Finally, it must be recognized that the bar primary is admittedly only temporizing with what informed opinion at the bar recognizes as an evil, the selection of judges by partisan or unguided non-partisan choice. It is only an effort to make the best of a bad situation. The intrinsic deficiencies of the system remain unaltered. The bar primary, commendable though its efforts may have been, has not stilled the voices demanding structural changes in the method of selecting judges. Indeed, it seems to have increased the demands for reform. Bar associations particularly active with bar primaries and bar campaigns have themselves often been the movers in such schemes. The bar primary by forcing the associations to concern themselves actively with the question of judicial personnel has led them afield into a consideration of the whole problem of selecting judges. Perhaps, this will prove to have been its greatest contribution.

(Excerpts from article in the New York State Bar Association *Bulletin*.)

JUNE AND JULY SPEAKING ENGAGEMENTS OF BAR MEMBERS

The following is a list of speaking engagements filled by members of the Los Angeles Bar Association and affiliated Bar Associations during the months of June and July:—

DATE	SPEAKER	ORGANIZATION	SUBJECT
June 2	Frank G. Tyrrell	California Tenth District Parent-Teachers Association	Plebiscite
June 6	Harry J. McClean	Ninth District Chamber of Commerce of Los Angeles	Plebiscite
June 7	John Perry Wood	Public Affairs Section, Friday Morning Club	Plebiscite
June 8	Arnold Praeger	Beverly Hills Bar Association	Plebiscite
June 9	Lawrence L. Larrabee	Riverside Drive Improvement Association	Plebiscite
June 10	Paul Fussel	Whittier Rotary Club	Plebiscite
June 10	Ewell D. Moore	Burbank Chamber of Commerce	Plebiscite
June 11	Walter F. Dunn	Whittier Bar Association	Plebiscite
June 13	Delvy T. Walton	Hermosa Beach Kiwanis Club	Plebiscite
June 14	Frank G. Tyrrell	Glendale Tuesday Afternoon Club	Plebiscite
June 20	Harry J. McClean	Hollywood Bar Association	Plebiscite
June 23	Frank G. Tyrrell	Van Nuys Kiwanis Club	Plebiscite
June 23	Delvy T. Walton	Uptown Chamber of Commerce	Plebiscite
June 29	Harry J. McClean	Kiwanis Club of South Pasadena	Plebiscite
July 5	Ewell D. Moore	Committee on Governmental Affairs, Los Angeles Chamber of Commerce	Plebiscite
July 6	Samuel R. Enfield	Municipal Committee, United States War Veterans	Plebiscite
July 7	Harry J. McClean	East Los Angeles Property Owners and Business Men's Association	Plebiscite
July 8	Ewell D. Moore	German American Society	Plebiscite

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Notice of Lease
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Notice to Remedy Default
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